

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott  
Ellen Gavin  
Marshall Johnson  
LeRoy Koppendrayner  
Phyllis A. Reha

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Petition of Level 3  
Communications, LLC for Arbitration of an  
Interconnection Agreement with Qwest  
Corporation Pursuant to 47 U.S.C. § 252(b)

ISSUE DATE: December 23, 2002

DOCKET NO. P-5733,421/IC-02-1372

ORDER ACCEPTING THE  
ARBITRATOR'S RECOMMENDATION  
AND REQUIRING FILED  
INTERCONNECTION AGREEMENT

**PROCEDURAL HISTORY**

On March 6, 2002, Level 3 Communications, LLC (Level 3) served Qwest Corporation (Qwest) with a request to negotiate an interconnection agreement under the federal Telecommunications Act of 1996 (the Act).<sup>1</sup>

On August 13, 2002, failing to reach agreement on the issues submitted for negotiation, Level 3 filed a petition for arbitration with the Commission.

On September 10, 2002, the Commission issued its ORDER ASSIGNING ARBITRATOR appointing Administrative Law Judge (ALJ) Kathleen A. Sheehy to hear the case.

On November 1, 2002, the ALJ submitted the Arbitrator's Recommended Decision (ALJ Report) to the Commission.

On November 12, 2002, Qwest filed exceptions to the ALJ Report.

On November 13, 2002, Qwest filed copies of findings made by the commissions in Colorado, Washington, and Oregon on what Qwest stated was the single legal issue to be arbitrated in this matter. Qwest stated that the commissions of these states decided the issue in favor of the language that Qwest proposed for the interconnection agreement with Level 3.

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<sup>1</sup> Public Law 104-104, codified at 47 U.S.C. @ 151 et seq. (the Act).

The Commission met on November 21, 2002 to consider this matter.

## **FINDINGS AND CONCLUSIONS**

### **I. ISSUE REFERRED FOR ARBITRATION**

Level 3 and Qwest negotiated Level 3's request to interconnect with Qwest and agreed on all but one term of the interconnection agreement. The unresolved term assigned to the ALJ for arbitration by the Commission's September 10, 2002 Order in this matter is as follows:

Should Level 3 be required to pay for trunks and facilities on the Qwest network used by Qwest to handle calls placed by its end users?

### **II. ARBITRATOR'S DECISION**

The ALJ concluded that Level 3 is not responsible for the recurring costs of originating traffic on Qwest's side of the network, and that traffic originating on Qwest's network that is bound for Internet Service Providers (ISPs) should not be excluded from the relative-use calculation agreed to by the parties to determine the appropriate charges for interconnection facilities (direct trunk transport and entrance facilities). The ALJ recommended that the language proposed by Level 3 should be incorporated into the parties' interconnection agreement. A copy of the ALJ's Report is incorporated herein by reference.

### **III. QWEST'S POSITION**

Qwest filed exceptions to the ALJ's Report, recommending that the Commission reject the ALJ Report and adopt the interconnection agreement language that Qwest proposed. Qwest argued that the ALJ improperly included internet traffic in "telecommunications traffic" in direct contradiction to the binding law. The ALJ's mistake, according to Qwest, was to begin her analysis with the premise that FCC Rule 51.703(b) requires that the originating carrier bear the "responsibility" for the costs of interconnection facilities when, as here, the interconnecting carrier [Level 3] sends no traffic back to Qwest.

Qwest asserted that this starting point is precluded by binding FCC orders that render the ALJ's analysis erroneous and her decision unlawful. The Company cited Rule 51.703(b) which provides:

A LEC may not assess charges on any other telecommunication carrier for telecommunications traffic that originates on the LEC's network.

Qwest stated that the threshold question, is whether Rule 51.703(b), which is part of the FCC's reciprocal compensation rule, applies to Internet traffic. Qwest's answer to that question was that binding FCC orders establish that it does not. The Company concluded that the ALJ's necessary premise (that the Rule 51.703 (b) applies to Internet traffic and that such traffic is "telecommunications traffic" as used in the rule) is wrong as a matter of law.

Qwest also argued that the ALJ's decision is wrong on policy grounds since it provides an unwarranted arbitrage opportunity, uneconomic subsidies, and an improper incentive to specialize in serving customers that foster such patterns of usage.

At the hearing, Qwest referred to decisions made by commissions in Washington, Oregon, and Colorado, stating that these commissions had decided in favor of Qwest's position and proposed interconnection language.

#### **IV. LEVEL 3**

Level 3 supported the ALJ's analysis and recommendation.

Level 3 argued that the FCC rules require incumbent local exchange carriers such as Qwest to pay for interconnection facilities used to bring their customers' calls to the point of interconnection with another carrier's (e.g. Level 3's) network and that Qwest's reliance on rules governing reciprocal compensation were misplaced. Level 3 rebutted Qwest's interpretation that the ISP Remand Order alters carriers' interconnection obligations and also rejected Qwest's assertion that treating ISP-bound traffic as local traffic for purposes of determining relative use of interconnection trunks permits improper arbitrage by carriers such as Level 3.

Level 3 clarified that contrary to the ALJ's recitation in Footnote 9 of her Report, Level 3 did indeed dispute the payment of the non-recurring charge necessary to "turn up" the leased trunks.

#### **V. THE DEPARTMENT**

The Department also supported the ALJ's analysis and recommendation.

The Department supported the ALJ's recommendation that the Commission adopt Level 3's proposed interconnection contract language. Like the ALJ, the Department rejected Qwest's contention that the law [47 C.F.R. 51.709(b)] requires the exclusion of ISP-bound traffic when calculating Qwest's "relative use" of the facilities Qwest uses to transport the ISP-bound traffic to its point of interconnection (POI) with Level 3. The Department stated that 47 C.F.R. 51.709(b) does not establish a rule for sharing costs incurred on the originating carrier's (Qwest's) side of the interconnection point (POI) between the two carriers.

## VI. COMMISSION ANALYSIS

Level 3 and Qwest have agreed that the division of financial responsibility for both parties' shared interconnection transport facilities will be based upon each party's relative use (percentage of traffic) on the facilities originated by each party.

Qwest and Level 3 disagreed about whether traffic originated by Qwest customers and directed to ISPs served by Level 3 should be included in the calculation of relative use. Level 3 proposed contract language that would **include** that traffic in the relative use calculation. Since Level 3 originates no traffic on its side of the network to be terminated on Qwest's side of the network, this would mean that Qwest would be solely responsible for the recurring and non-recurring costs on its side of the POI. By contrast, Qwest proposed contract language that would **exclude** that traffic from the relative use calculation and, since Level 3 originates no traffic on its side of the network to be terminated on Qwest's side of the network, this would mean that Qwest would apply no credit to Level 3's monthly bill, leaving Level 3 solely responsible for the recurring and non-recurring costs of the interconnection facilities that allow Qwest's customers to reach Level 3's network, i.e. the facilities on Qwest's side of the POI.

After reviewing the parties' written arguments and considering their oral arguments at the hearing, the Commission concludes that the ALJ's decision and rationale (pages 4-10) are correct and Qwest's objections are not persuasive.

Contrary to Qwest's assertions, the FCC Rules do not support Qwest's position. 47 C.F.R § 51.703(b) provides that Qwest is responsible for routing the call from the Qwest customer to the point of interconnection between Qwest and Level 3 and must absorb all costs associated with the origination of traffic on Qwest's side of the network. The rule prohibits Qwest from imposing any charge on Level 3 for traffic that originates on Qwest's network. The rule states:

A LEC [local exchange carrier] may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.

Qwest's claim that the Federal Communications Commission's (FCC's) *TSR Wireless* decision<sup>2</sup> supports its position is unfounded. In *TSE Wireless*, the FCC found that the ILECs were bound by FCC Rule 51.703(b) to absorb the costs of delivering their customers' traffic to the POI between the ILEC network and the network serving one-way paging companies. In making this ruling, the FCC specifically recognized that the paging traffic being delivered was (like the ISP-bound traffic in this case) exclusively one-way.

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<sup>2</sup> *In the Matter of TSR Wireless, LLC, v. U S West Communications, Inc.*, 15 FCC Rcd at 1116 (June 21, 2000), *aff'd sub. nom., Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001) (*TSR Wireless*).

Similarly, Qwest's argument that the requirements regarding the costs of interconnection and originating traffic apply only to a specific method of interconnection (Mid-Span Meet POI) and do not apply to Level 3's leasing trunks from Qwest has no support in the Act or FCC rules.

In addition, in the *ISP Order on Remand*, the FCC stated that it was unwilling to take any action that would establish separate intercarrier compensation rates, terms and conditions for local voice and ISP-bound traffic.<sup>3</sup> Qwest's recommendation would do just that. For ISP-bound traffic, Qwest would have the Commission ignore FCC Rule 51.703(b) and shift to Level 3 all the costs of carrying Qwest's originating traffic over Qwest's network to the POI, while for voice traffic, Qwest would bear all the costs of transporting traffic originating on its network to the POI.

Finally, the Commission is not persuaded by the reasoning of the state commissions (Colorado, Washington, and Oregon) that have accepted Qwest's arguments. The Arizona commission's decision in favor of Level 3 is the only order cited that recognized the distinction between interconnection requirements (applicable to the issue at hand) and reciprocal compensation obligations (not relevant to the issue at hand).

In short, Qwest's attempt to draw a distinction between locally dialed voice traffic (whose cost it admits it must defray under this rule) and locally dialed ISP-bound traffic is without foundation.

Regarding Level 3's clarification that it did, indeed, dispute paying the non-recurring charge necessary to "turn up" the trunks, the Commission finds that clarifying the record on that point is appropriate and does not alter the validity and appropriateness of the ALJ's Decision and Rationale (pages 4-10) and Recommendation (page 10).

## **VII. COMMISSION ACTION**

Accordingly, the Commission will adopt the Arbitrator's Recommended Decision, absent the second sentence on the top of page 3 (including Footnote 9) and amending the final sentence of the first paragraph on page 3 to read as follows:

The relative use calculation would be applied to the monthly recurring and non-recurring charges billed to Level 3, against which Qwest would apply a credit for any traffic originated by Qwest that is terminated to Level 3. (The words added to the sentence by this change are underlined.)

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<sup>3</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) (*ISP Order*), vacated and remanded sub.nom., *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) (*ISP Remand Order*) at ¶90.

The parties will be directed to file a complete interconnection agreement, including both arbitrated and negotiated terms, within 30 days of the issuance of this Order.

### **ORDER**

1. The Commission hereby adopts the report of the administrative law judge (ALJ's Report) in full except as follows:

The second sentence at the top of page 3 of the ALJ's Report (including footnote 9) is removed and the final sentence in the first paragraph at the top of page 2 is amended to read as follows:

The relative use calculation would be applied to the monthly recurring and non-recurring charges billed to Level 3, against which Qwest would apply a credit for any traffic originated by Qwest that is terminated to Level 3.  
[Underlined words added to the original.]

2. The parties shall file a complete interconnection agreement, including both arbitrated and negotiated terms, within 30 days of the date of this Order.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

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